STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY RYAN RUSSELL,

Defendant-Appellant.

UNPUBLISHED
May 16, 2006

No. 259073
Kalamazoo Circuit Court
LC No. 04-000130-FC

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his conviction for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

On January 14, 2004, the victim was killed by a single gunshot to the back of the head; defendant admitted that he inflicted the fatal wound, but testified that he acted in self-defense.

On appeal, defendant first asserts that his trial counsel was ineffective in failing to preserve and present an insanity defense and in failing to move to suppress, or to object to the admission of a statement defendant gave to Aruban police. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. Ordinarily, a trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the instant matter, however, the trial court was not presented with and did not rule on defendant's claim. Therefore, this Court is left to its own review of the facts contained in the record in evaluating defendant's assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms and, but for his counsel's errors there is a reasonable probability that the results of his trial would have been different, rendering the proceedings fundamentally unfair and unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant's assertion that he was denied the effective assistance of counsel with regard to the strategic decision not to present an insanity defense lacks merit. Presentation of an

insanity defense would have been entirely inconsistent with defendant's assertions that he shot the victim in self-defense and was belied by his own very detailed, very cogent testimony about the relevant events. While defendant could have presented inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), he must now overcome the strong presumption that defense counsel pursued a theory of self-defense alone as a matter of sound trial strategy, which this Court will not second-guess. *Rodgers, supra* at 715; *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). Defendant has not established that such a strategy was unsound. We conclude defense counsel exercised her professional judgment to select a trial strategy that did not include an insanity defense.

Additionally, there is no indication in the record that defendant could have established the requisite elements of an insanity defense. Voluntary intoxication cannot form the basis for an insanity defense, MCL 768.21a(2). Moreover, the testimony presented at trial, including defendant's, indicated that defendant acted deliberately, with much thought and appreciation for the wrongfulness of his conduct.

Defendant's assertion that his trial counsel was ineffective for failing to move to suppress or to object to the admission of defendant's statement to Aruban authorities also lacks merit. As an initial matter, we note that in general, statements taken by foreign police in the absence of *Miranda*[1] warnings are admissible in Unites States courts so long as those statements are voluntary. *See United States v Yousef*, 327 F3d 56, 145-146 (CA 2, 2003), and *United States v Abu Ali*, 395 F Supp 2d 338, 381-382 (ED Va, 2005). There are two exceptions to this rule: where United States law enforcement agents either actively participate in, or use foreign officials as agents to conduct the questioning in order to circumvent the requirements of *Miranda*, or where statements are obtained under circumstances that "shock the judicial conscience." *Yousef, supra* at 145-146; *Abu Ali, supra* at 381-382. Defendant does not allege that either exception applies here. Further, the record is clear that the statement was voluntarily given after defendant had been advised that he did not have to answer any questions, that he had a right to a lawyer, and after defendant signed an Aruban advice of rights form indicating that he understood these rights. There is no indication that defendant was compelled to speak to the authorities, or that his waiver of his Aruban rights was not knowing or intelligent.

Defendant argues that he was neither advised nor understood that his statement to Aruban authorities could be used against him in our courts. But what is required is that defendant be aware of his available options; he need not comprehend the ramifications of exercising or waiving his rights. *People v Daoud*, 462 Mich 621, 636-637; 614 NW2d 152 (2000). Defendant understood that he had the right not to answer questions and that he had a right to a lawyer under Aruban law. Therefore, there was no basis for asserting either that defendant's statement to Aruban police should have been suppressed or its admission objected to. Thus, defense counsel was not ineffective for failing to assert a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392, (2003).

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant next argues that the trial court erred in denying his motion to quash; however, defendant does not assert that there was insufficient evidence presented at trial to support his conviction. Therefore, even if the magistrate's bindover had been erroneous, that error was rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Defendant also argues that the trial court erred in admitting DNA evidence and autopsy photographs. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant did not object to the admission of this evidence at trial; therefore, he must establish plain error affecting the outcome of his trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1990).

This Court repeatedly has taken judicial notice of the general acceptance of DNA testing in the scientific community. See *People v Coy*, 243 Mich App 283, 291-292; 620 NW2d 888 (2000) ("*Coy I*"), and *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995). This Court also has determined that statistical evidence of DNA is generally admissible. *People v Coy*, 258 Mich App 1, 11; 669 NW2d 831 (2003) ("*Coy II*"). This Court continues to reject *Davis-Frye*[2] challenges to statistical analysis of DNA evidence, finding that such arguments are relevant to the weight of such evidence and not its admissibility. *Coy II, supra* at 11. Therefore, the trial court did not abuse its discretion in admitting the testimony regarding DNA evidence without requiring additional foundational testimony.

Further, the only DNA evidence presented at trial was offered to identify the victim's body and to establish that the blood in a Jeep was the victim's. Defendant admitted as much in his own testimony, and this evidence did not contradict defendant's assertion that he acted in self-defense. Therefore, even if admission of the DNA evidence were error, defendant cannot establish plain error affecting his substantial rights.

Defendant also asserts that the trial court abused its discretion in admitting photographs of the victim. We disagree. As our Supreme Court explained in *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995):

> The decision to admit or exclude photographs is within the sole discretion of the trial court. Photographs are not excludable simply because a witness can orally testify about information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [Citations omitted.]

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[2] As this Court noted in *Coy II, supra* at 9 n 2, "The *Davis-Frye* test requires that novel scientific methods be shown to have gained general acceptance in the scientific community to which it belongs before being admitted as evidence at trial"; it is derived from the holdings of *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955) and *Frye v United States*, 54 App DC 46, 47; 293 F 1013 (1923).

The photographs admitted at trial were factual representations of the injuries the victim suffered. They served to illustrate the medical examiner's testimony and allowed the jury to evaluate the nature of the victim's injuries and whether those injuries were more consistent with the prosecutor's or defendant's version of events. Thus, the trial court did not abuse its discretion in admitting them.

Finally, defendant asserts that the prosecutor committed misconduct by commenting on his post-arrest silence during closing argument. Defendant is correct that a prosecutor may not comment on a defendant's post-arrest silence. *Goodin, supra* at 432. Contrary to defendant's assertion, however, the prosecutor did not comment on defendant's post-arrest silence. We find that the prosecutor permissibly argued that the veracity of defendant's testimony that he was acting in self-defense when he shot the victim could be assessed by comparing that testimony to his prior statements, which included no such explanation. A prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, a defendant may be impeached by his prior failure to state a fact in circumstances in which that fact naturally would have been asserted. *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991). As our Supreme Court explained in *People v Cetlinski (After Remand)*, 435 Mich 742, 749; 460 NW2d 534 (1990):

> [W]hen an individual has not opted to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence. The omission is nonverbal conduct that is to be considered an assertion of the nonexistence of the fact testified to at trial if a rational juror could draw an inference of inconsistency.

See also, *People v Cole*, 411 Mich 483, 487-488; 307 NW2d 687 (1981) (cross-examination of defendant as to inconsistencies between her trial testimony and statements given prior to trial do not infringe on defendant's right to remain silent).

We affirm.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey